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In the

Supreme Court of the United States

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,
vs.
JOHN W. BANKS, II, *Respondent*.

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,
vs.
SIGITAS J. BANAITIS, *Respondent*.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Ninth Circuits

BRIEF *AMICI CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE BAZELON CENTER FOR MENTAL HEALTH LAW, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, AND THE NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law, The Bazelon Center for Mental Health Law, the National Asian Pacific American Legal Consortium, the National Association for the Advancement of Colored People, the National Association of Protection and Advocacy Systems, and the National Women's Law Center submit this Brief as *amici curiae* with the consent of the parties,[1] in support of respondents' argument that a taxpayer's gross income under section 61(a) of the Internal Revenue Code does not include the portion of a litigation or settlement recovery that is paid to his attorneys pursuant to a contingent fee agreement.

These civil rights *amici* submit this brief because of the impact a ruling on this issue will have on victims of unlawful discrimination. The ability to obtain experienced legal counsel is a key component of a victim's right to be free from unlawful discrimination in our society. To the extent that the victim is required to pay taxes on the full amount of a contingent fee recovery in civil rights cases, the cost of settlement is driven up, the concept of "make whole" relief underlying many of the civil rights laws is undermined, and there could well be a chilling effect on a victim's interest in even obtaining counsel in civil rights cases. The people served by the *amici* will be directly affected by this Court's ruling in this matter.

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") is a nonprofit civil rights

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[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their staffs, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

organization that was formed in 1963 at the request of President Kennedy in order to involve private attorneys throughout the country in the national effort to insure the civil rights of all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors and many of the nation's leading lawyers. Through the Lawyers' Committee and its independent local affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country. The Lawyers' Committee is interested in ensuring that the goal of civil rights legislation, to eradicate discrimination, is fully realized, and is concerned in this case with the potential negative impact on a plaintiff's ability to obtain full and proper relief for valid civil rights claims. The resolution of this case will have a significant effect on the extent to which the Lawyers' Committee can protect the rights of its clients.

The Judge Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Bazelon Center engages in litigation, administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities. In its litigation, the Bazelon Center frequently asserts claims under civil rights laws with fee-shifting provisions, such as the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public

policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a long-standing interest in civil rights issues that have an impact on the Asian Pacific American community, and this interest has resulted in NAPALC's participation in a number of amicus briefs before the courts.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of age, racial, religious, and ethnic bias.

The Training and Advocacy Support Center of the National Association of Protection and Advocacy Systems ("TASC/NAPAS") provides training and technical assistance to the nationwide network of protection and advocacy ("P&A") agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. This case is of particular interest to TASC/NAPAS because the taxation of fees can have a chilling effect on individuals with disabilities who are trying to vindicate their rights, especially in cases seeking declaratory and injunctive relief.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the

corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity for women in education, the workplace, and other settings, including through litigation of cases brought under federal anti-discrimination laws, often with the assistance of private attorneys. NWLC has a deep and abiding interest in insuring that these laws are fully implemented and enforced. NWLC is also the leading women's organization working on tax issues and has worked for more than 20 years to improve tax policies affecting women and their families.

SUMMARY OF ARGUMENT

Petitioner contends that respondents should be taxed on the full amount recovered on their claims. Petitioner argues that the parties' contingent fee arrangements involved the assignment of income by respondents to their lawyers in an amount equal to the lawyers' share of the recoveries. Under this Court's precedents, the argument runs, the income so assigned is properly taxed to respondents.

The assignment of income principle actually supports respondents, not petitioner. An assignment of income occurs when a taxpayer who expects to earn income, or who is already in control of income, assigns some or all of that income to another party who makes no contribution to the production of the income and therefore cannot be said to have earned it. In such situations, this Court has held that such income should be taxed to the assignor.

Here, at the time respondents entered into their negotiated, arm's length contingent fee agreements, they had no ability to know whether they would realize any income from their legal claims. The assistance of competent counsel was needed in order to convert the claims into income. Both

respondents (with their claims) and the lawyers (with their services) contributed to the production of the income realized. Each party earned, and should properly be taxed on, his respective share of the amount recovered.

There is no support for petitioner's additional argument that respondents realized income because their lawyers' fees were paid by the defendants directly out of the recoveries. This argument invokes the principle that a taxpayer realizes income when another party satisfies the taxpayer's obligation to a third party. Here, respondents had no personal obligations to their lawyers that could be satisfied when the legal fees were paid.

Because the division of proceeds contemplated by the contingent fee agreements did not involve an assignment of income by respondents and violated no other tax principles, the agreements should be respected for tax purposes. The lawyers were indisputably taxable on the fees they received. Respondents should not also be taxed on the same amounts.

A result in favor of petitioner here would not only be contrary to established tax principles; it would also directly undermine the concept of "make whole" relief embedded in our civil rights laws. Plaintiffs seeking to vindicate their civil rights might even be discouraged from retaining lawyers to assist them in their efforts. A contingent fee arrangement may be the only viable arrangement a plaintiff can enter into in many such cases. If petitioner prevails here, a victorious plaintiff in a contingent fee case might actually be worse off economically than if she took no action at all, because her alternative minimum tax liability on the full recovery might exceed the share of the recovery that she receives. Congress cannot have intended the tax laws to produce a result that would clash so directly with its intentions in the civil rights area.

If, notwithstanding the arguments made in favor of affirmance, this Court decides to reverse the decisions below on the ground that contingent legal fees should be taxed both to the successful plaintiffs and to the lawyers receiving them, this Court should make it clear that its decisions are not intended to apply to those cases in which the court awards reasonable attorney's fees to a prevailing plaintiff's counsel pursuant to a federal fee-shifting statute. Such statutory fees differ from contingent fees because Congress has determined the conditions under which they are payable and the court determines the amount to be paid.

ARGUMENT

I. The "Assignment of Income" Principle Supports Respondents, Not Petitioner.

Petitioner argues that the decisions below should be reversed because they failed to apply the "assignment of income" principle in a proper manner. According to petitioner, both cases involve a classic assignment of income by respondents to their lawyers in an amount equal to the lawyers' share of the recovery proceeds. Citing cases such as *Lucas* v. *Earl*, 281 U.S. 111 (1930), and *Helvering* v. *Horst*, 311 U.S. 112 (1940), petitioner contends that such assignments were ineffective to shift away from respondents the tax liability for the full amount recovered on their claims.

The instant cases are not classic assignment of income cases. The typical assignment of income cases generally fall into one of two categories – (1) a taxpayer intending to provide services for compensation assigns a portion of his anticipated compensation to another party, or (2) a taxpayer owning income-producing property assigns a portion of the anticipated income to another party. In the first category of cases, the taxpayer fully expects to earn the income being assigned. In the second category, the taxpayer

is already in control of the income. In both categories, the assignment is gratuitous and the assignee does not contribute in any way to the production of the income being assigned.

The precise issue presented in the assignment of income cases is which of the two parties – assignor or assignee – should be taxed on the income being assigned. In both categories of cases, this Court has held that the assignor should be taxed. *Lucas* v. *Earl*, 281 U.S. at 114-15; *Helvering* v. *Horst*, 311 U.S. at 147-49; *see also Commissioner* v. *Sunnen*, 333 U.S. 591, 609 (1948).

The basic principle established in those leading cases is that tax liability cannot be shifted by diverting to another party income that the taxpayer himself earns or controls. Under what is now section 61(a) of the Internal Revenue Code, Congress intended income to be taxed to the person who earns it (*Earl*, 281 U.S. at 114-15), or to the person who controls the property producing it (*Horst*, 311 U.S. at 166; *Sunnen*, 333 U.S. at 607). In the words of *Earl* and *Horst*, assigning to another party merely the fruit from a tree, but not the tree itself, will not be respected for tax purposes. *Compare Blair* v. *Commissioner*, 300 U.S. 5 (1937) (holding that the assignment of a beneficial interest in a trust was not an impermissible assignment of income).

A. Respondents and Their Lawyers Earned Their Respective Shares of the Recoveries.

The instant cases are completely different from the classic assignment of income cases. Under the principles established by this Court, they should be affirmed.

At the time respondents entered into their fee arrangements with their lawyers, they had no idea whether their claims could be converted into income. Competent legal representation was needed to realize whatever potential

value there may have been in the claims. A fee arrangement was agreed upon under which the lawyers would be paid a calculable amount, but only if there were a recovery and then only out of the proceeds of the recovery.

Under the contingent fee agreements, respondents retained the right to discharge their lawyers. In addition, a settlement could not be reached without their approval. Respondents thus reserved some control over the handling of their cases. Respondents may also have played a role in the cases by providing information and testimony, and by participating in strategic decisions. They were, however, in no position by themselves to control the outcome of the proceedings. Such recovery as they might enjoy would result from either a negotiated settlement or a favorable determination by a judge or jury, all of which required the involvement of their lawyers.

In terms of fees, respondents and their lawyers had a choice: they could have agreed on a fixed (or hourly) fee arrangement, or, as was done here, on a contingent fee arrangement. (Respondent in *Banks* (No. 03-892) brought his claims under federal statutes that permit the award of statutory legal fees by the court if the plaintiff prevails. The case was ultimately settled.)

In a fixed fee case, the lawyer is paid his fee by the claimant regardless of the outcome of the case. The lawyer has the possibility of earning a fee that exceeds the amount recovered, but he does not share the risk of an unfavorable result. In a fixed fee case, the claimant essentially states to the lawyer: "I will pay your fee no matter what the outcome. Whatever is recovered is mine."

In other words, in a fixed fee case the claimant and the lawyer plant separate trees and each enjoys (and must be taxed on) the fruit produced by his tree. The claimant is

therefore entitled to, and thus should be taxed on, the full amount of any recovery.

In a contingent fee case, the situation is completely different. The claimant and the lawyer agree to share the risk. In essence, they pool their resources. The claimant provides the capital (the claim) and the lawyer provides the labor (legal services). The lawyer will be compensated only if he produces a recovery, and then only out of the proceeds of such recovery. Unlike the situation in the fixed fee case, the lawyer's compensation is completely dependent on the outcome of the case. In a contingent fee case, the claimant essentially states to the lawyer: "I will not pay your fee. You will earn your fee out of what you are able to recover. The balance will be mine."

In other words, in a contingent fee case the claimant and the lawyer jointly agree to plant a single tree and share whatever fruit it may bear. Each therefore should be taxed only on his respective portion of any recovery.

Petitioner sees it differently. Petitioner asserts that even in contingent fee cases, the entire amount of the recovery should be taxed to the claimant. Since the lawyer is also taxed on his share of the proceeds, petitioner allows the claimant a miscellaneous itemized deduction for the amount so taxed to the lawyer. *See* 26 U.S.C. § 67(b). But such a deduction does not provide a dollar-for-dollar benefit in computing the claimant's taxable income and is not even taken into account in computing the claimant's alternative minimum tax liability. Petitioner's position thus has distinct adverse tax consequences to the claimant. *See* 26 U.S.C. § 67(a) (providing that miscellaneous itemized deductions are allowable only to the extent that the aggregate of such deductions exceeds two percent of adjusted gross income); 26 U.S.C. § 56(b)(1)(A)(i) (disallowing miscellaneous itemized deductions in computing the alternative minimum

tax). (The same adverse tax consequences may exist in a fixed fee case, but the successful contingent fee lawyer is likely to receive a larger fee than would his counterpart handling the same case on a fixed fee basis. The adverse tax consequences to the claimant are thus likely to be greater where contingent fees are involved.)

Petitioner either misunderstands or misapplies this Court's assignment of income principles. Petitioner ignores the fact that in *Lucas* v. *Earl*, Mrs. Earl made no contribution to her husband's earning of compensation for the services he rendered. 281 U.S. 113. Therefore, when Mrs. Earl reported one-half of her husband's income as hers, based solely on a prior arrangement under which Mr. Earl had agreed to have that portion of his income assigned to her, this Court ruled against her on the ground that Mr. Earl himself had earned all the income and was therefore the proper party to be taxed on it. Id. at 114-15.

In *Helvering* v. *Horst*, the interest coupons in question were attached to bonds that had been purchased by Mr. Horst. 311 U.S. 114. As the bond owner, Mr. Horst was the person entitled to cash in the coupons. Mr. Horst's son had made no contribution of any kind toward ownership of the bonds. He was not in control of the bonds and would not have been entitled to enjoy any income from them but for the gift made to him by his father. Accordingly, this Court held that the income from the coupons was properly taxable to Mr. Horst and not to his son. Id. at 120.

Here, by contrast, there would have been no income at all without the joint collaboration of respondents and their lawyers. Both parties clearly contributed to the production of the income realized when the recoveries were achieved. The instant cases therefore present something of a twist to the assignment of income issue.

In contrast to *Earl* and *Horst*, the instant cases go beyond the basic question whether the "assignor" or the "assignee" is the proper party to be taxed on a specific amount of income said to have been "assigned." The lawyers here clearly earned their respective shares of the recoveries and such amounts were properly taxable to them.

The instant cases raise the broader issue whether the amounts admittedly taxable to the "assignees" (the lawyers) should also simultaneously be taxed to the "assignors" (respondents). Did both parties simultaneously earn that portion of the recoveries? The assignment of income cases clearly do not address that issue.

As the Eighth Circuit succinctly stated in an early case: "The 'earner' of income is one whose personal efforts have produced it, who owns property which produced it or a combination of the two." *Van Meter* v. *Commissioner*, 61 F.2d 817, 817 (8th Cir. 1932). Here, both parties combined to earn the income in question. The arrangements they entered into were arm's length, commercial arrangements, not gratuitous arrangements designed to shift either respondent's tax burden in another direction. Because there was no assignment of income, the division of proceeds agreed to by the parties should be respected for tax purposes.

B. Respondents Had No Obligations To Their Lawyers That Were Satisfied By the Defendants' Payment of Their Legal Fees.

Perhaps recognizing the weakness in his assignment of income argument, petitioner also seeks support from this Court's decision in *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716 (1929), which is not an assignment of income case. (Pet. Br. 19.) Again, however, petitioner is relying on inapposite authority.

Old Colony Trust involved the direct payment by an employer of its employee's tax obligations to the Government. This Court held that such payments, though not received by the employee, nevertheless constituted additional income to him, just as if they had been made to the employee so that he could pay the taxes himself.

The rule of *Old Colony Trust* is that if another party makes a payment to a third party to satisfy a taxpayer's obligation to the third party, the payment so made constitutes income to the taxpayer. Id. at 729-31. *Old Colony Trust* would be applicable here if respondents had incurred personal obligations to pay their lawyers' fees. In such a case, payment of such fees by the defendants, directly or indirectly, as part of the recoveries would have constituted income to respondents.

But those are not the facts here. Under respondents' contingent fee agreements, legal fees were payable only if a recovery were obtained and then only out of the recovery. Neither of the respondents had a personal obligation to pay the fees earned by the lawyers when the cases were finally resolved. As a result, payment of those fees by the defendants, directly or indirectly, could not have satisfied any obligations of respondents to their lawyers, because respondents had no obligations to their lawyers when the payments were made. Like *Lucas* v. *Earl* and *Helvering* v. *Horst*, *Old Colony Trust* has no application in contingent fee cases such as those now before this Court.

* * *

To summarize, in a fixed fee case, it is proper to tax the claimant on the entire recovery. That would be true whether the claimant receives the full amount or directs that part of it be paid to his lawyer. Because the lawyer's fee is not dependent on, or otherwise tied to the recovery, the

claimant has earned, and has complete dominion and control over, the entire amount recovered. He is therefore properly taxed on the full amount.

By contrast, in a contingent fee case, it is not proper to tax the claimant on the entire recovery. The claimant and the lawyer have pooled their resources and agreed to divide whatever results may be achieved. The lawyer's fee is solely dependent on, and is a specific portion of, the amount recovered. The claimant thus has not earned, and does not have complete dominion and control over, the entire recovery. He therefore cannot properly be taxed on the full amount.

Whether the parties choose a fixed fee arrangement or a contingent fee arrangement is a matter of arm's length negotiation. Some lawyers will only handle certain cases on a fixed fee basis; others will only handle the same cases on a contingent fee basis. Some claimants prefer a fixed fee arrangement. Other claimants may no have the funds to pay a fixed fee and can only proceed on a contingent fee basis. While the parties may consider the possible tax consequences to the claimant in reaching their agreement, many other considerations are likely to be of equal, if not more, importance.

Applying this Court's pronouncements to the situations here presented, it seems clear that respondents should be taxed only on their respective shares, and not on the full amount of the recoveries obtained.

II. Taxing the Plaintiff On the Attorney's Contingent Fee Is Inconsistent With the Purposes of Civil Rights Laws

In the experience of *amici*, plaintiffs in civil rights cases often enter into contingent fee agreements with private

attorneys because they do not have the funds to pay a fixed fee.[2] Thus, a large share of civil rights cases will be directly affected by the ruling in the instant cases. Taxing the plaintiff on the attorney's contingent fee would contradict not only established principles of the Internal Revenue Code, but also the express purpose of civil rights laws.

Specifically, such double taxation would undermine Congressional intent to provide "make whole" relief to victims of discrimination and to encourage settlements of civil rights cases. *See* Sager and Cohen, *How the Income Tax Undermines Civil Rights Law*, 73 S. Cal. L. Rev. 1075 (2000). Moreover, Congress has recognized that private lawsuits vindicate not only individual civil rights, but also the broader public interest in penalizing and deterring unlawful discrimination. *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 2-3, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910. This Court has also recognized the public benefit of civil rights litigation. "Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *City of Riverside* v. *Rivera*, 477 U.S. 561, 574 (1986).

Taxing litigants on the contingent fees their lawyers receive could have a chilling effect on a plaintiff's interest in obtaining counsel to initiate a civil rights case, because a plaintiff subject to the alternative minimum tax could actually end up in a worse position economically by winning the case than by doing nothing. At a minimum, taxing litigants on contingent legal fees would drive up settlement costs, because plaintiffs would need more money to cover their tax obligations. The increased cost of settlements would undermine Congress' intent to promote conciliation of

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[2] As noted earlier, attorneys' fees in certain civil rights cases may also be determined by statute.

civil rights cases. *See, e.g., Burlington Indus.* v. *Ellerth*, 524 U.S. 742, 764 (1998) (recognizing "Congress' intention to promote conciliation rather than litigation in the Title VII context").

Furthermore, as noted, the double taxation of attorney's fees would undermine the goal of providing "make whole" relief to victims of discrimination. *See, e.g., Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419, 421 (1975) ("The 'make whole' purpose of Title VII is made evident by the legislative history. . . . Congress' purpose in vesting a variety of 'discretionary' powers in the courts was . . . to make possible the 'fashion[ing] [of] the most complete relief possible.'" (*quoting* 118 Cong. Rec. 7168 (1972)). The purpose of "make whole" relief is to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974). If a successful plaintiff is required to pay taxes on the attorney's contingent fee, the plaintiff's net recovery will fall short of the express goal of "make whole" relief.

Surely Congress did not intend that the Internal Revenue Code would be construed so as to produce a result that undercuts the very objectives of its civil rights legislation.

III. The Statutory Fee Issue.

If, notwithstanding the arguments made in favor of affirmance, this Court decides to reverse the decisions below and hold that the contingent attorney's fees are taxable to both respondents and their lawyers, this Court's opinion should differentiate the instant cases from those involving statutory fees.

Statutory fee cases are different from contingent fee cases because, in a statutory fee case, the court decides on the amount of legal fees to be paid to plaintiff's counsel.[3] Under the statutory scheme, a prevailing plaintiff may petition the court for an order directing the defendant to pay the legal fees of the plaintiff's counsel. Statutory fees are nominally awarded by the court to the plaintiff, but in fact are intended for plaintiff's counsel. *See Kay* v. *Ehrler*, 499 U.S. 432 (1991) (stating that the purpose of fee-shifting statutes is "to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights," thus justifying denial of a statutory fee award to a plaintiff who, although a lawyer, appeared *pro se*). In some cases, statutory fees are paid to a non-profit entity organized under section 501(c)(3) of the Internal Revenue Code that has provided legal services to the plaintiff. *See* Brief of Mountain States Legal Foundation *et al*, as *Amici Curiae* in Support of Respondents. Settlements in statutory fee cases may also provide for legal fees.

Sometimes, the statutory fees awarded by the court can exceed the amount of the plaintiff's recovery. *See, e.g.*, *City of Riverside* v. *Rivera*, 477 U.S. at 581; *Porter* v. *Director, U.S. Agency for Int'l Dev.*, 293 F. Supp. 2d 152 (D.D.C. 2003). That is always true in the large number of statutory fee cases where only injunctive and declaratory relief is sought or available. *See, e.g.*, 42 U.S.C. 2000a-3 (authorizing actions only for injunctive relief against public accommodations discriminating on the basis of race); 42

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[3] Statutory fees may be awarded by a court under numerous federal statutes which permit the award of attorney's fees to a prevailing party. *See, e.g.*, Fair Housing Amendments Act of 1988, 42 U.S.C. § 3613(c)(2); Americans with Disabilities Act, 42 U.S.C. § 12205; Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A); Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b); Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k).

U.S.C. § 12188(a) (same where discrimination is against persons with disabilities).

In contingent fee cases, the plaintiffs and their lawyers reach an arm's length agreement on how any recovery would be shared. In statutory fee cases, Congress has determined that the plaintiff's counsel should receive a reasonable fee if the plaintiff prevails, but the plaintiff has no control over the amount to be awarded. That decision is left entirely to the court.

As can be seen, there is a strong basis for concluding that the assignment of income doctrine and any other legal theories that might be considered supportive of petitioner's position in a contingent fee case would have no application in a statutory fee case. (For a full discussion of the reasons why attorney's fees obtained pursuant to a fee shifting statute do not constitute income to the claimant, *see* Brief of the National Employment Lawyers' Association, *et al*, as *Amici Curiae* in Support of Respondents.)

Because they frequently find themselves involved in statutory fee cases, *amici* respectfully request this Court to make it clear that any decision in favor of petitioner with respect to the payment of contingent fees is not intended to apply to statutory fee cases.

CONCLUSION

For all of the foregoing reasons, *amici* urge this Court to affirm the decisions of the United States Courts of Appeals for the Sixth and Ninth Circuits.

Respectfully submitted,

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